



Item 5(d), 4.22.08 meeting.

**REVISED STAFF DRAFT (4.11.08)**

## **ADVISORY OPINION 08-XX**

Interpretation of T.C.A. § 3-6-301 with respect to the definition of lobbyist and employer of a lobbyist as applied to activities of a public relations firm in connection with operation of an internet site addressing specific legislation.

Requestors: Senator Doug Jackson  
Representative Curry Todd

### **QUESTIONS**

1. If a public relations firm receives compensation to maintain a website for the purpose of promoting or opposing certain legislation, and provides visitors with the option of sending a prepared statement to their legislators urging action, is the firm required under the Ethics Reform Act ("Act") to register as a lobbyist?
2. If the public relations firm identified in question number one (1) is required to register as a lobbyist, is the association that pays the firm to maintain the website required to register as the employer of that lobbyist ("employer") under the Act?
3. If the public relations firm's failure to register is a violation of the Act, what are the potential penalties or sanctions?
4. If the association's failure to register is a violation of the Act, what are the potential penalties or sanctions?

### **ANSWERS**

1. Yes. Under the facts assumed in the opinion request, a public relations firm that receives compensation to maintain a website for the purpose of promoting or opposing certain legislation is required to register as a lobbyist under the Act.
2. Yes. Under the facts assumed in the opinion request, the association paying the firm to maintain the website must register as the employer of the public relations firm lobbyist.
3. If the public relations firm failed to register within seven days after becoming a lobbyist, it is subject to civil penalties up to a maximum of seven hundred fifty (\$750.00) dollars for failure to register. If the firm is or was engaged in lobbying knowing or having reason to know that the association was not registered as the employer of the firm, the firm is potentially subject to civil penalties up to the amount of ten thousand (\$10,000.00) dollars. If the firm intentionally violated the registration requirement, it is subject to criminal prosecution. A first

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offense is a Class C misdemeanor, a second offense is a Class B misdemeanor, and a third or subsequent offense is a Class A misdemeanor.

4. If the association failed to register within seven days after the firm commenced lobbying for the association, the association is subject to civil penalties up to a maximum of seven hundred fifty (\$750.00) dollars for failure to register. If the association used the services of the firm knowing or having reason to know that the firm was not registered, the association is potentially subject to civil penalties up to the amount of ten thousand (\$10,000.00) dollars. If the association intentionally violated the registration requirement, it is subject to criminal prosecution. A first offense is a Class C misdemeanor, a second offense is a Class B misdemeanor, and a third or subsequent offense is a Class A misdemeanor.

**ASSUMED FACTS**

The following Advisory Opinion is in response to written inquiries from Senator Doug Jackson and Representative Curry Todd.<sup>1</sup> They both ask whether, under the circumstances described in their requests, Seigenthaler Public Relations (“Seigenthaler”)<sup>2</sup> is engaged in lobbying on behalf of Wine and Spirits Wholesalers of Tennessee (“Wholesalers”) against passage of Senate Bill (“SB”) 1977.<sup>3</sup> The requests ask whether Seigenthaler must register as a lobbyist and whether Wholesalers must register as the employer of Seigenthaler.<sup>4</sup> Finally, they ask what potential penalties are provided for if either entity has violated the Act.

According to the requests, the Wholesalers employed Seigenthaler to oppose passage of SB 1977. Specifically, the Wholesalers hired Seigenthaler for the purpose of organizing the public to contact their legislators in opposition to SB 1977. In this capacity, The Wholesalers hired Seigenthaler to send direct mail to members of the public encouraging them to oppose the bill. The direct mail is sent under the name of the website, signed by an executive of

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<sup>1</sup> For the purposes of issuing this advisory opinion, the Commission assumes, without deciding, the truth of the facts presented in the request. A meaningful advisory opinion cannot be issued without assuming some set of facts to which the provisions of the Act may be applied. The statute authorizing the Commission to issue advisory opinions provides, in pertinent part, that “[w]ith respect to an issue addressed in an advisory opinion, any person who conforms that person’s behavior to the requirements of the advisory opinion may rely upon the advisory opinion without threat of sanction.” Tenn. Code Ann. § 3-6-107(3). If no facts are assumed, the Commission cannot inform the requestor how to conform his or her conduct to the requirements of the opinion. To the extent any of the assumed facts turn out to be untrue, or a person does not in fact conform his or her conduct to the facts assumed, the advisory opinion may provide no protection from the imposition of sanctions.

<sup>2</sup> According to its website ([www.seig-pr.com](http://www.seig-pr.com)), Seigenthaler is a full service public relations firm specializing in corporate communications. The Wholesalers are not listed as one of its clients.

<sup>3</sup> SB 1977 would amend Title 57, chapter 3 of Tennessee Code Annotated to provide for issuance of licenses to both in-state and out of state entities to ship wine directly to Tennessee consumers age 21 years and older for personal use. The bill is sponsored by Senator Jackson, Representative Todd and other members of the General Assembly. A copy is attached.

<sup>4</sup> Under the Act, an employer must register separately for each lobbyist employed. An explanation of the registration requirements for lobbyists and employers of lobbyists can be found in Tenn. Code Ann. § 3-6-302.

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Seigenthaler, and encourages the recipient to contact listed lawmakers regarding SB 1977. Further, Seigenthaler has been paid to encourage the public to visit a website created by Seigenthaler, [www.stopteendrinkingttn.org](http://www.stopteendrinkingttn.org). The website addresses issues relating to distribution of alcoholic beverages, including wine. The website also provides visitors a form letter or e-mail to send to legislators to oppose passage of SB 1977.<sup>5</sup>

Senator Jackson states he can find no registration statement for Seigenthaler as a lobbyist or the Wholesalers as its employer.<sup>6</sup> Commission staff verified that no such registrations are on file.

**ANALYSIS**

**Registration Requirement (Questions 1 and 2).**

The Act requires, within seven days of employing or accepting employment as a lobbyist, one must register with the Commission.<sup>7</sup> Tenn. Code Ann. § 3-6-301(17) provides, “‘lobbyist’ means ‘any person who engages in lobbying for compensation.’”<sup>8</sup> “Employer” means “any person or entity who retains or otherwise arranged for a lobbyist to engage in lobbying on behalf of the entity for compensation.”<sup>9</sup> “Lobby,” in turn, “means to communicate, directly or indirectly, with an official in the legislative branch or executive branch for the purpose of influencing any legislative or administrative action.”<sup>10</sup> The question presented is whether the activities described amount to direct or indirect communication between Seigenthaler and officials in the legislative branch, thus requiring Seigenthaler to register as a lobbyist and the Wholesalers to register as employers.

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<sup>5</sup> According to Seigenthaler, public relations firms are commonly hired to create websites such as the one in question. A survey of materials Seigenthaler provided seems to indeed show a plethora of similar websites. This opinion, however, answers only whether Seigenthaler and the wholesalers must register with the Commission as a lobbyist and an employer, respectively. The pervasiveness of such websites makes it no more or less likely that the activity is or is not lobbying.

<sup>6</sup> Lobbyist and employer of lobbyist registration statements are publicly available and searchable at the Commission’s website; [www.state.tn.us/sos/tec](http://www.state.tn.us/sos/tec). According to the Commission’s records, Seigenthaler is not registered as either a lobbyist or an employer of a lobbyist. The Wholesalers are registered as an employer of a lobbyist for three lobbyists, none of whom appear to be employed or associated with Seigenthaler.

<sup>7</sup> Tenn. Code Ann. § 3-6-302(a).

<sup>8</sup> It is important that the Act notes that lobbyists can be “persons.” While “individual” is not so broadly defined, “person” is defined by Tenn. Code Ann. § 3-6-301(21) as “any individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons.” Thus, a lobbyist could be an individual or a legal entity, such as a corporation. This understanding of who can be a “lobbyist” is bolstered by Tenn. Code Ann. § 3-6-301(8) which provides, “ ‘Employer of a lobbyist’ or ‘employer’ specifically includes any such person or entity notwithstanding the lobbyist’s status as an employee, agent, subcontractor, subcontractor or other representative lobbying on behalf of such person or entity for compensation.”

<sup>9</sup> Tenn. Code Ann. § 3-6-301(8).

<sup>10</sup> Tenn. Code Ann. § 3-6-301 (15).

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The Act regulates persons compensated to “communicate” with an official in the legislative or executive branch for the purpose of influencing legislative or administrative action. “Communicate” is not defined in the Act. In construing the Act, the Commission must ascertain and give effect to the legislative intent without unduly restricting or expanding the Act’s coverage beyond its intended scope.<sup>11</sup> “The legislative intent and purpose are to be ascertained primarily from the natural and ordinary meaning of the statutory language.”<sup>12</sup>

The dictionary meanings of “communicate” include: “to make known,” “to manifest: disclose,” “to have an interchange, as of ideas or information,” or “to express oneself effectively.”<sup>13</sup> There is, thus, more than one plain and ordinary meaning of the word “communicate” that may apply, and the meanings are different.

The different meanings of the verb “communicate” are not resolved by reference to the modifiers “directly” and “indirectly.” To the extent that the phrase “to communicate, directly or indirectly” is ambiguous, it is appropriate to turn to words used in related statutes,<sup>14</sup> the overall legislative purpose,<sup>15</sup> and legislative history.<sup>16</sup>

The related provisions of the act, and the statement of legislative intent to increase transparency,<sup>17</sup> show an overall legislative purpose to improve disclosure of lobbying activities.

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<sup>11</sup> [\*Sallee v. Barrett\*, 171 S.W.3d 822 \(Tenn.2005\); \*McGee v. Best\*, 106 S.W.3d 48 \(Tenn.Ct.App.2002\).](#)

<sup>12</sup> *State v. Blackstock*, 19 S.W.3d 200, 210 (Tenn. 2000).

<sup>13</sup> *Webster’s II New College Dictionary*, 233 (3<sup>rd</sup> ed. 2005).

<sup>14</sup> Statutes “relating to the same subject or having a common purpose” should be construed together, and the construction of one may be used to help resolve ambiguity in another. [\*Lyons v. Rasar\*, 872 S.W.2d 895, 897 \(Tenn. 1994\).](#)

<sup>15</sup> “In ascertaining the intent of the legislature, this Court may look to the language of the statute, its subject matter, the object and reach of the statute, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment.” *State v. Edmondson*, 231 S.W.3d 925 (Tenn. 2007), quoting *State v. Collins*, 166 S.W.3d 721, 726 (Tenn.2005) (internal quotation marks and citation omitted).

<sup>16</sup> *State v. Edmondson*, 231 S.W.3d 925, 927-28 and nn. 5, 6 (Tenn. 2007) (“possession” not defined in carjacking statute, and dictionary definition did not resolve issue; court considered terminology used in related robbery statute, as well as statements in legislative debates to the effect that legislators wanted the state carjacking law to differ from the federal law, and that all carjackings should be prosecutable as B felonies, regardless of whether a deadly weapon was used).

<sup>17</sup> The statement of intent found in the Act provides:

It is the intent of the general assembly that the integrity of the processes of government be secured and protected from abuse. The general assembly recognizes that a public office is a public trust and that the citizens of Tennessee are entitled to a responsive, accountable, and incorruptible government. The Tennessee Ethics Commission is established to sustain the public's confidence in government by increasing the integrity and transparency of state and local government through regulation of lobbying activities, financial disclosure requirements, and ethical conduct.

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To construe “communicate” as requiring an “interchange” of ideas would greatly narrow the scope of the statute. Such a construction would lead to the absurd result that presenting facts, opinions, and other information to an official, for compensation, with the purpose of influencing official action, would not be subject to regulation so long as the official did not respond to the presentation with facts, opinions, or other information of his or her own. Statutes should be construed “with the saving grace of common sense” and to avoid an absurd result.<sup>18</sup> Furthermore, as previously noted by the Commission, the Act’s definition of “lobby” is “broad.”<sup>19</sup> It does not make sense to construe “communicate” in a narrow fashion within such a broad definition. On the other hand, it is not absurd to construe “communicate” to require only a making known or manifesting of information to the official, regardless of whether the official responds.

As seen above, Seigenthaler is engaged in communication for the purpose of influencing legislative activity and the Wholesalers have compensated Seigenthaler for this activity. The question then becomes whether the provision of form letters and e-mails to website visitors in opposition to a particular piece of legislation, together with the provision of electronic facilities for sending those letters and e-mails to directly to legislators, amounts to direct or indirect communication with legislators thus requiring Seigenthaler to register as a lobbyist.<sup>20</sup>

**Seigenthaler’s Actions as Communication**

In 2002, Drew Rawlins, the Executive Director of the Tennessee Registry of Election Finance (“Registry”) was charged with administering the Lobbyist Registration and Disclosure Law of 1975. (“1975 Law”)<sup>21</sup> In this capacity, Mr. Rawlins asked the Attorney General (“AG”) the following question: “Would it be considered ‘lobbying’ under state law if a group runs an advertisement telling people to call specific legislators on a specific topic in order to influence legislation.”<sup>22</sup> The AG responded as follows:

Such activity would be a direct or indirect communication for the purpose of influencing legislative action as used in the definition of the Lobbying Laws to define lobbying that triggers the registration and disclosure requirements. But a group that expends its own money for such communications is not doing so ‘for pay or for any consideration’ within the meaning of the same definition. If the

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<sup>18</sup> [\*State ex rel. Maner v. Leech\*, 588 S.W.2d 534, 540 \(Tenn. 1979\)](#) (citations omitted).

<sup>19</sup> Advisory Opinion 06-03, at 11 (Dec. 12, 2006).

<sup>20</sup> Requiring Seigenthaler to register as a lobbyist would in no way restrict or direct Seigenthaler’s message. The Act only requires lobbyists and employers register as such with the Commission, whatever message they may be promoting or opposing. To this end, the Act serves the important governmental interest of protecting the integrity of the governmental process. Tenn. Code Ann. § 3-6-102 (stating the purpose and scope of the Act); *Kimball v. Hooper*, 665 A.2d 44, 47 (Vt. 1995)(protecting the integrity of the governmental process is an important governmental interest).

<sup>21</sup> Enacted by 1975 Tennessee Public Acts, chapter 313, and codified, as amended, in former Tenn. Code Ann. § 3-6-101; § 2-10-205 (2002).

<sup>22</sup> Tenn. Op. Atty. Gen. 02-024, at \*1 (2002).

group is receiving contributions such as money or any other consideration for pay for the advertisements and other activities, then it is engaged in lobbying as defined under the Lobbying Laws.<sup>23</sup>

This 2002 AG Opinion is bolstered by a 2005 AG Opinion which concluded the ban on legislators accepting fees for “consulting services” was intended to include “advertising or other informational services that specifically target legislators”<sup>24</sup>

Though the ethics statutes discussed above were rewritten in 2006, the terms “lobby,” “lobbyist,” and “consulting services” were left almost completely unchanged.<sup>25</sup>

When the Legislature did revise the 1975 Law and create the Act in 2006, the legislature could have changed the meaning of “lobby,” “lobbyist,” or “consulting services” if it wished to change the result of the AG opinions discussed above. It is well-established that the “[l]egislature is presumed to know the state of the law on the subject under consideration at the time it enacts legislation.”<sup>26</sup> That the legislature left the definitions of these terms intact lends weight to the proposition that Seigenthaler’s activity is properly considered lobbying.

Further, a statutory construction, “long accepted by an executive department of the State will usually be accepted by the Courts unless the administrative construction is a palpably wrong construction of an unambiguous statute.”<sup>27</sup>

Tenn. Op. Atty. Gen. 02-024 above determined an advertisement telling people to call specific legislators on a specific topic in order to influence legislation would be “direct or indirect communication” if the group were compensated for its action.<sup>28</sup> The failure of the AG to state whether the communication was direct or indirect was likely not an oversight.

### Seigenthaler’s Activities as Direct Lobbying

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<sup>23</sup> *Id.*

<sup>24</sup> Tenn. Op Atty. Gen. 05-95, at 4 (2005)(emphasis added).

<sup>25</sup> Former Tenn. Code Ann. § 3-6-104(13) defined “lobbyist” as “any person who engages in lobbying.” Former Tenn. Code Ann. § 3-6-102(12) defined “lobby” as “to communicate, directly or indirectly, with any official in the legislative branch or executive branch, for pay or for any consideration, for the purpose of influencing any legislative action or administrative action.” Finally, former Tenn. Code Ann. § 2-10-122(1) appears to be both unmoved and unchanged in any way.

<sup>26</sup> *Lavin v. Jordan*, 16 S.W.3d 362, 368 (Tenn. 2000)(noting that the legislature appeared to have adopted language directly from a Supreme Court opinion construing a previous version of the statute).

<sup>27</sup> *Williams v. Mass. Mut. Life Ins. Co.*, 427 S.W.2d 845 (1967). *See also*, *Nat’l. Council on Comp. Ins. v. Gaddis*, 786 S.W.2d 240, 242 (Tenn. Ct. App. 1989), p.t.a. denied (Tenn. 1990)(“Where a statute is subject to construction, we accord persuasive weight to administrative interpretations.”); *State v. Black*, 897 S.W.2d 680, 683 (Tenn. 1995) (“Although opinions of the Attorney general are not binding on courts, government officials rely on them for guidance; therefore this [Attorney General] opinion ... is entitled to considerable deference.”).

<sup>28</sup> At \*1 (2002).

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The Commission can require Seigenthaler to register as a lobbyist and the Wholesalers to register as an employer under the theory that they are engaged in direct lobbying.

Under federal law, telling people to call specific legislators in order to influence legislation is “grassroots lobbying.”<sup>29</sup> Further, under the federal view, grassroots lobbying is a type of direct lobbying.<sup>30</sup> Thus, federally, Seigenthaler’s activity on behalf of the wholesalers could be deemed direct lobbying.

A communication only qualifies as a direct, grassroots lobbying under the federal scheme, if the communication, “(A) Refers to a specific legislation; (B) Reflects a view on such legislation; and (C) Encourages the recipient of the communication to take action with respect to such legislation.”<sup>31</sup>

Thus, a website created to oppose or promote a certain piece of legislation would not be direct, grassroots lobbying unless it “encouraged the recipient of the communication to take action with respect to such legislation.”<sup>32</sup> “[E]ncouraging the recipient of the communication to take action is defined as a communication which:

- (A) States that the recipient should contact a legislator or an employee of a legislative body, or should contact any other government official or employee who may participate in the formulation of legislation (but only if the principal purpose of the urging contact with the government official or employee is to influence legislation);
- (B) States the address, telephone number, or similar information of a legislator or an employee of a legislative body;
- (C) Provides a petition, tear-off postcard or similar material for the recipient to communicate with a legislator or an employee of a legislative body, or with any other government official or employee who may participate in the formulation of legislation (but only if the principal purpose of the urging contact with the government official or employee is to influence legislation); or ...<sup>33</sup>

The federal government considers such action to be direct lobbying because of the language and later interpretations of the seminal United States Supreme Court case of *United States v. Harriss*.<sup>34</sup>

<sup>29</sup> 26 C.F.R. § 56.4911-2(b)(2)(i).

<sup>30</sup> 26 C.F.R. §§ 56.4911(b)(2)(iv).

<sup>31</sup> 26 C.F.R. § 56.4911(b)(2)(ii). All of these definition are linked to 26 U.S.C.A. § 4945 which establishes a tax on private foundations and certain otherwise tax-exempt organizations which conduct “propaganda, or otherwise attempt to influence legislation.” 26 U.S.C.A. § 4945(d)(1).

<sup>32</sup> *Id.*

<sup>33</sup> 26 C.F.R. § 56.4911-2(b)(2)(iii)(subsection D omitted as subsection D is not specifically exempted from direct communication).

<sup>34</sup> 347 U.S. 612 (1954)

In *United States v. Harriss*, the Supreme Court determined the Federal Regulation of Lobbying Act of 1947 had to be narrowly construed to survive constitutional scrutiny.<sup>35</sup> To that end, the Court determined the Federal Lobbying Act could only regulate direct lobbying activities.<sup>36</sup> At the same time, however, the Court determined that “artificially stimulated letter campaigns” were direct lobbying activities which could be regulated by the Federal Lobbying Act.<sup>37</sup> As *Harriss* is still good law, grassroots lobbying is, at present, federally regulated as a type of direct lobbying.<sup>38</sup>

### **Seigenthaler’s Activities as Indirect Lobbying**

The Commission can require Seigenthaler to register as a lobbyist and the Wholesalers to register as an employer under the theory that they are engaged in indirect lobbying.

A finding that Seigenthaler’s activities are indirect lobbying would be supported by the case law of states outside of Tennessee. In many states, the grassroots activity described above as direct lobbying would instead be regulated as indirect lobbying. The Washington Supreme Court, for example, requires disclosure of funded letter campaigns as indirect lobbying.<sup>39</sup> Other courts have engaged in similar reasoning.<sup>40</sup>

Oddly enough, and despite the federal statutory law interpreting *Harriss*,<sup>41</sup> several states cite *Harriss* for the proposition that artificial letter campaigns may be regulated as indirect lobbying.<sup>42</sup>

### **The Purpose of the Act**

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<sup>35</sup> *United States v. Harriss*, 347 U.S. at 620-621.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 621, n.10.

<sup>38</sup> 26 C.F.R. §§ 56.4911(b)(2)(iv).

<sup>39</sup> *Young Am. for Freedom, Inc v. Gorton*, 522 P.2d 189, 190-192 (Wash. 1974)(discussing that to interpret “indirect” as failing to require disclosure of funded letter campaigns “would leave a loophole for indirect lobbying without allowing or providing the public with information and knowledge re the sponsorship of the lobbying and its financial magnitude.”).

<sup>40</sup> See also, *Comm’n. on Indep. Coll. and Univ. v. The N.Y. Temp. State Comm’n on Reg. of Lobbying*, 539 F.Supp 489, 496 (N.D.N.Y 1982)(noting that *Harriss* reached only direct lobbying, but declaring that *Harriss* allowed for the regulation of indirect lobbying).

<sup>41</sup> Other federal materials also refer to *Harriss*’ finding that “artificially stimulated letter campaigns” are a type of direct lobbying. Cong. Research Serv., 110<sup>th</sup> Cong., Grassroots Lobbying: Constitutionality of Disclosure Requirements, 101(2007).

<sup>42</sup> See footnote 40.

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The Act allows for the regulation of direct and indirect lobbying. As discussed above, the Commission may regulate Seigenthaler's activities as either direct, or indirect lobbying. Under either interpretation, however, the Act supports regulating these activities.

"In ascertaining the intent of the legislature, this Court may look to the language of the statute, its subject matter, the object and reach of the statute, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment."<sup>43</sup>

The stated purpose of the Act is as follows:

It is the intent of the general assembly that the integrity of the processes of government be secured and protected from abuse. The general assembly recognizes that a public office is a public trust and that the citizens of Tennessee are entitled to a responsive, accountable, and incorruptible government. The Tennessee Ethics Commission is established to sustain the public's confidence in government by increasing the integrity and transparency of state and local government through regulation of lobbying activities, financial disclosure requirements, and ethical conduct.<sup>44</sup>

The Act's stated purpose is akin to the purpose discussed in *Harriss* and *Gorton*. In both cases, the courts discussed the need for an informed public.<sup>45</sup> Restating the importance of government transparency, the Supreme Court has repeatedly quoted its own language in *Grosjean v. Am. Press Co.*, which states, "informed public opinion is the most potent of all restraints upon misgovernment."<sup>46</sup>

Requiring Seigenthaler to register as a lobbyist under the circumstances described above would serve to "increase the transparency of state and local government" and would thus be consistent with the purposes of the Act.<sup>47</sup> Seigenthaler has been paid to establish a website for the purpose of opposing passage of SB 1977. While this may not be enough to require registration given the definition of grassroots lobbying discussed above, Seigenthaler's website goes further and attempts to influence legislative action by encouraging the recipient of the

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<sup>43</sup> *State v. Edmondson*, 231 S.W.3d 925 (Tenn. 2007), quoting *State v. Collins*, 166 S.W.3d 721, 726 (Tenn.2005) (internal quotation marks and citation omitted).

<sup>44</sup> Tenn. Code Ann. § 3-6-102.

<sup>45</sup> *Harriss*, 347 U.S. at 620; *Gorton*, 522 P.2d at 190-192.

<sup>46</sup> 297 U.S. 233, 250, 56 S.Ct. 444, 449 (1936).

<sup>47</sup> Disclosure serves the important governmental interest of protecting the integrity of the government process. *Kimball v. Hooper*, 665 A.2d 44, 47 (Vt. 1995). As stated by the United States Supreme Court, "disclosure requirements...appear to be the least restrictive means of curbing the evils of...ignorance and corruption." *Buckley v. Valeo*, 424 U.S. 1 (1976). The Act does not express a preference for a particular viewpoint, or regulate the message any lobbyist or employer may express. The Act regulates only lobbyists acting in their capacity as lobbyists attempting to influence legislative action or administrative action.

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communication to take action.<sup>48</sup> Seigenthaler's website not only encourages the public to contact their legislators on SB 1977, the website offers visitors the chance to send a prepared communication to legislators who represent the visitor. The prepared communication asks the legislator who receives the communication to oppose the passage of SB 1977, and gives reason(s) for opposing the bill.<sup>49</sup> This action is very similar to the, "artificially stimulated letter campaign" alluded to in *Harriss*, and the "indirect lobbying" discussed in *Gorton*. 347 U.S. at 620; 522 P.2d at 192.<sup>50</sup> If it is assumed that Seigenthaler has been retained and compensated to produce the website, then Seigenthaler is a lobbyist and is required to register with the Commission pursuant to T.C.A. § 3-6-302. Wholesalers would likewise be required to register as an employer of a lobbyist pursuant to T.C.A. §§ 3-6-302 if it, in fact, retains and compensates Seigenthaler for these activities.<sup>51</sup>

### Potential Penalties or Sanctions (Questions 3 and 4)

Senator Jackson and Representative Todd ask if potential penalties could be imposed on the employer and the lobbyist for failure to register if it were shown that a person that should have registered as a lobbyist or an employer did not do so timely. Assuming, but not deciding that this were the case, both the lobbyist and the employer would be subject to civil penalties of \$25 per day, up to a maximum of \$750, for failure to timely register. T. C. A. §§ 3-6-306 (a)(1) (A) and (a)(2)(A). The employer would be subject to a penalty of up to \$10,000 if it uses the services of a lobbyist knowing or having reason to know that the lobbyist is not registered. T.C.A. § 3-6-306(a)(1)(B). The lobbyist would be subject to a penalty of up to \$10,000 if he or she lobbies on behalf of an employer knowing or having reason to know that the employer has not registered. T.C.A. § 3-6-306(a)(2)(B). An intentional violation of the registration

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<sup>48</sup> Thus the activities go far beyond the simple legislative monitoring activities before the Commission in Advisory Opinion 06-03. That opinion concluded that persons who are employed to monitor legislation without attempting to influence legislative or administrative action are not lobbying and do not need to register.

<sup>49</sup> Seigenthaler points out that website users can alter the prepared communication so as to entirely change the message sent to the legislator and for this reason the prepared web communication differs entirely from the grassroots lobbying discussed in *Harriss*, *Gorton*, and, presumably, the Tennessee Attorney General Opinions discussed herein. This argument is not persuasive. It would be absurd to interpret the Act to require registration only if the target audience engages in communication in the manner advised. A construction which would lead to an absurd result is to be avoided. *Wachovia Bank of N.C v. Johnson*, 26 S.W.3d 621, 624 (Tenn. Ct. App. 2000)(courts should presume the legislature did not intend an absurd result).

In other words, whether one is an individual lobbyist or a legal entity which is a lobbyist, one may be a lobbyist even if one is ineffective.

<sup>50</sup> One federal court considering this language defined an "artificially stimulated letter campaign" as "'imitating propaganda', i.e., a campaign to stimulate the public to directly contact legislators by letters or telegrams, etc.'" *Comm'n on Indep. Coll. and Univ. v. N.Y. Temp. State Comm'n on Regulation of Lobbying*, 534 F. Supp. 489, 495 n. 6 (N.D. N.Y. 1982)(citation to *Harriss* omitted). The court there upheld regulation of "indirect" lobbying against a constitutional overbreadth challenge on the grounds that the regulation went no further than the activities enumerated in *Harriss*. 534 F. Supp., at 496-97 (stating, *inter alia*, that the court in *Harriss* "held that indirect lobbying, in the form of campaigns to exhort the public to send letters and telegrams to government officials, could be included within the definition of lobbying activities").

<sup>51</sup> In addition to registering as an employer, the Wholesalers must also report their lobbying expenditures, including their grassroots lobbying expenses. Tenn. Code Ann. § 3-6-303.

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requirement is a criminal offense. A first offense is punishable as a C misdemeanor, and a second offense is punishable as a B misdemeanor. Third and subsequent offenses are punishable as A misdemeanors. T.C.A. § 3-6-306(d).

If the assumed facts are true of the ongoing activities of Seigenthaler and the Wholesalers, then both Seigenthaler and Wholesalers are also potentially subject to an injunction to prevent continued violation. T.C. A. § 3-6-306(e). Violation of an injunction can be punished as criminal contempt of court. Tenn. Code Ann. § 29-9-102.

The reader should bear in mind that these potential penalties are the potential injunction would have to be based on proven facts, not just assumptions. The Commission implies no conclusion whatsoever as to whether the assumptions upon which this advisory opinion is based could be proven in administrative proceedings or in a court of law.

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